FILED

U.S. BANKRUPTCY COURT
WESTERN DISTRICT OF NC

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

JUN 20 1991

RICHARD SHARON GROSHON
By: _____
Deputy Clerk

JUDGEMENT ENTERED ON JUN 20 1991

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| In Re:<br><br>*JAMES L. ACKER and*<br>*KATHRYN T. ACKER,*<br><br>Debtors. | Case No. 89-31304<br>Chapter 13 |
| *RANSOM J. BACKUS and*<br>*GEORGANN BACKUS,*<br><br>Debtors. | Case No. 86-00709<br>Chapter 13 |
| *GRACIE MAE BREWER,*<br><br>Debtor. | Case No. 89-30077<br>Chapter 13 |
| *ARLIE CECIL BURROUGHS,*<br><br>Debtor. | Case No. 89-30418<br>Chapter 13 |
| *CATHERINE CHAPMAN,*<br><br>Debtor. | Case No. 86-00058<br>Chapter 13 |
| *ROBERT L. COLE, JR. and*<br>*JVONNE L. COLE,*<br><br>Debtors. | Case No. 89-31590<br>Chapter 13 |
| *ERNEST CUNNINGHAM and*<br>*JEWELL CUNNINGHAM,*<br><br>Debtors. | Case No. 85-00164<br>Chapter 13 |
| *EUGENE A. DAWKINS,*<br><br>Debtor. | Case No. 87-00382<br>Chapter 13 |
| *THOMAS W. DOWLING and*<br>*MARGARET P. DOWLING,*<br><br>Debtors. | Case No. 90-32037<br>Chapter 13 |

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| *DENNY O. EDMONDS and TERESA EDMONDS,* Debtors. | Case No. 90-31543 Chapter 13 |
| *GARY EDWARDS,* Debtor. | Case No. 85-00824 Chapter 13 |
| *GLENN CHARLES GARELLA and NINA WILLIAMS GARELLA,* Debtors. | Case No. 89-30493 Chapter 13 |
| *BILLY (NMN) GILLIARD and ESSIE HAIR GILLIARD,* Debtors. | Case No. 89-30687 Chapter 13 |
| *RONALD T. GOSNELL and DEBORAH L. GOSNELL,* Debtors. | Case No. 85-00714 Chapter 13 |
| *CHARLES NEAL CISNE, JR., d/b/a DEAC Petroleum and Equity Planning Corp.,* Debtor. | Case No. 90-31167 Chapter 11 |
| *RAJ KUMAR and BARBARA STEIN KUMAR* Debtors. | Case No. 91-30099 Chapter 11 |

*ORDER DETERMINING ATTORNEY FEE AWARD*

These sixteen cases are before the court on separate applications for attorney's fees in each case by the debtors' attorneys (David R. Badger & Associates, P.A.), and the objection of

the Bankruptcy Administrator to each fee application. The Bankruptcy Administrator objected to: (1) The rate of $225/hour requested by Mr. Badger and (2) the practice of assigning to each case one hour's time for preparation and submission of the fee application. For the reasons that follow, the court has concluded that: (1) The reasonable hourly rate for Mr. Badger in these cases is $175/hour in the Chapter 13 cases and $195/hour in the Chapter 11 cases; and (2) the time spent in preparation and submission of the fee application is compensable, but only for the time actually spent by the attorney, or one-tenth of an hour if the actual time was not recorded. In each case captioned above, the court will enter an Order specifically calculating and awarding the attorney's fees consistent with this Order.

**DISCUSSION**

While there is no precise formula dictating how to calculate an attorney's fee award in all cases, it is the duty of the court to provide a concise, but clear, explanation of its award of attorneys' fees. Hensley v. Eckerhart, 461 U.S. 424, 436-37 (1983).

Section 330 of the Bankruptcy Code provides for the payment of attorneys' fees as follows:

> ...the court may award to...the debtor's attorney -
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> (1) reasonable compensation for actual, necessary services rendered by such...attorney...and by any paraprofessional persons employed by such...attorney...based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than a case under this title; and
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> (2) reimbursement for actual, necessary expenses.

11 U.S.C. § 330(a). This formulation is more detailed than most statutory attorneys' fee provisions. See e.g., 42 U.S.C. § 1988; 42 U.S.C. § 2000e-5(g); 42 U.S.C. § 7604(d). However, the United States Court of Appeals for the Fourth Circuit has held that it is appropriate in a bankruptcy case to consider the factors and analysis developed by the courts in applying other statutory fee provisions. Harman v. Levin, 772 F.2d 1150, 1152 (4th Cir. 1985). Consequently, it is appropriate to review the guidelines established by the courts for determination of reasonable attorneys' fees.

A number of the decisions of the United States Supreme Court and the Fourth Circuit provide guidance in determination of reasonable attorneys' fees. See e.g., Missouri v. Jenkins, 491 U.S. 274, 109 S. Ct. 2463 (1989); Blanchard v. Bergeron, 489 U.S. 87, 109 S. Ct. 939 (1989); Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987); Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983); Lilly v. Harris-Teeter Supermarket, 842 F.2d 1496, 1510 (4th Cir. 1988); Daly v. Hill, 790 F.2d 1071 (4th Cir. 1986); and Barber v. Kimbrell's, Inc., 577 F.2d 216 (4th Cir.) (adopting standards of Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974)), cert. denied, 439 U.S. 934 (1978); see also City of Riverside v. Rivera, 477 U.S. 561 (1986); Buffington v. Baltimore County, Md., 913 F.2d 114 (4th Cir. 1990); Equal Employment Opportunity Comm'n. v. Service News Co., 898 F.2d 958 (4th Cir. 1990); National Wildlife Fed'n. v. Hanson,

859 F.2d 313 (4th Cir. 1988); Spell v. McDaniel, 852 F.2d 762 (4th Cir. 1988). These appellate decisions have established and preserved a number of principles.[1]

The Supreme Court has recognized that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley, 461 U.S. at 433; see Blanchard, 109 S. Ct. at 944-45. The Court has noted that "[t]his calculation [known as the lodestar fee] provides an objective basis on which to make an initial estimate of the value of a lawyer's services." Hensley, 461 U.S. at 433; see Blanchard, 109 S. Ct. at 944-45. The Supreme Court also has noted that "[w]hen, however, the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee...." Blum, 465 U.S. at 897. The Supreme Court has instructed courts deciding what constitutes reasonable hours to consider such factors as staffing or over-staffing, the skill and experience of the attorneys, the existence (or absence thereof) of excessive, redundant or unnecessary hours, "billing judgment" and the results obtained in the litigation. See Hensley, 461 U.S. at 434-37. The Supreme Court has recognized, however, that hours not reasonably expended should not be compensated.

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[1] The following summary is intended only to be a broad outline of the major guidelines involving attorney's fees established in the decisions in the Supreme Court and the Fourth Circuit. It is not intended to be exhaustive or inclusive.

Id. at 434. The Supreme Court has noted that "the 'reasonable fee' is to be calculated according to the prevailing market rates in the relevant community." Blum, 465 U.S. at 895. The Supreme Court has recognized, however, that determining the "market rate" for the services of a lawyer is inherently difficult. Id. at 895-96 n. 11; see Jenkins, 109 S. Ct. at 2470. The Supreme Court has suggested that determining the market rate is at least partly a function of the type of services rendered and the lawyer's experience, skill, and reputation. See Jenkins, 109 S. Ct. at 2470; Blum, 465 U.S. at 895-896 n. 11.

In Daly v. Hill, the Fourth Circuit expressed standards and procedures to be used in determining reasonable fees as follows:

> (a) While the Supreme Court continues to endorse use of the Johnson factors in calculating fee awards ... the Court has disapproved of the procedure endorsed by this court in Anderson. Out of a concern that upward adjustments of a lodestar figure can sometimes result in "double counting," ... the Court has suggested that most Johnson factors are appropriately considered in initially determining the lodestar figure, not in adjusting that figure upward. According to the Court, "the critical inquiry in determining reasonableness [of a fee award] is now generally recognized as the appropriate hourly rate." ... If the hourly rate is properly calculated, "the 'product of reasonable hours times [the] reasonable rate' normally provides a 'reasonable' attorney's fee...." Daly, 790 F.2d at 1077 (citations omitted).
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> (b) Under Blum the critical focus in calculating a reasonable attorney's fee is in determining the lodestar figure. If a lodestar fee is properly calculated, adjustment of that figure will, in most cases, be unnecessary. Consequently, Blum has shifted the timing of the Johnson analysis, as it has been applied in this circuit. The proper point at which the Johnson factors are to be considered is in determining the reasonable rate and the reasonable hours.

Id. at 1078.

(c) A fee based upon reasonable rates and hours is presumed to be fully compensatory without producing a windfall.
Id. at 1078.

(d) In "exceptional circumstances," this presumptively fair lodestar figure may be adjusted to account for results obtained and the quality of representation. Under Anderson, only Johnson factors one and five were properly considered in determining the lodestar fee.
Id. at 1078 (footnote omitted).

(e) However, a prevailing attorney is not entitled to an upward adjustment of the lodestar fee simply because he or she did a good job.
Id. at 1082.

(f) As Blum makes clear, the lodestar fee is now the proper focus of the entire Johnson analysis in most cases.
Id. at 1078.

(g) A proper computation of the lodestar fee will, in the great majority of cases, constitute the "reasonable fee" contemplated by § 1988.
Id. at 1078.

(h) In Hensley, the Supreme Court directed district courts to "exclude from the initial fee calculation hours that were not 'reasonably expended.'" Counsel for a prevailing party has a duty to exercise "billing judgment" to "exclude from a fee request hours that are excessive, redundant or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.... 'Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority.'"
Id. at 1079. (citations omitted).

(i) The burden of proving entitlement to compensation, however, rests with the prevailing attorneys.... as is customary [petitioners] submitted affidavits from other area attorneys as evidence that their requested rates were within the market rates generally charged for similar services.
Id. 1079-80.

(j) The great weight of authority in this circuit and others clearly establishes that a prevailing plaintiff is entitled to compensation for reasonable litigation expenses....
Id. at 1084.

(k) [T]he court should reconsider the reasonableness of the rates in light of [the effects of inflation or foregone interest caused by delay in payment].
Id. at 1081.

(l) Time spent defending entitlement to attorneys' fees is properly compensable....
Id. at 1080.

The Fourth Circuit has noted that the results obtained in the litigation is a factor that received special emphasis by the Supreme Court in Hensley. Lilly, 842 F.2d at 1511.

The Supreme Court has recognized that upward adjustment of the lodestar fee (reasonable hours x reasonable rate) may be proper in "exceptional" circumstances. See Hensley, 461 U.S. at 437. Distilling all that the Supreme Court has stated on upward adjustments, however, yields only one conclusion -- only a rare and exceptional case merits upward adjustment of the lodestar fee. See Delaware Valley Citizens' Council, 483 U.S. at 725; Blum, 465 U.S. at 897; Hensley, 461 U.S. at 434-37. As the Fourth Circuit noted in Daly, "...a prevailing attorney is not entitled to an upward adjustment of the lodestar fee simply because he or she did a good job." Daly, 790 F.2d at 1082.

Likewise, the Supreme Court has held that enhancement of the reasonable fee on account of the risk of non-payment is "reserved for exceptional cases where the need and justification for such enhancement are readily apparent and are supported by evidence in

the record and specific findings by the courts." Delaware Valley Citizens' Council, 483 U.S. at 728.

Finally, the statutory language of § 330 and its legislative history are of particular note regarding attorney compensation in bankruptcy cases. The specific statutory language directs courts to base attorney's fees in bankruptcy cases on "the cost of comparable services other than (those) in a case under" the Bankruptcy Code. 11 U.S.C. § 330(a)(1). The statutory language, as amended by Congress in 1978, effectively overrules In re Beverly Crest Convalescent Hospital, Inc., a decision of the United States Court of Appeals for the Ninth Circuit setting arbitrary limits on fees based upon notions of conservation of the estate and economy of administration. See In re Beverly Crest Convalescent Hospital, Inc., 548 F.2d 817 (9th Cir. 1976, as amended 1977). As stated in the House Report accompanying the 1978 amendments to § 330:

> If that case were allowed to stand, attorneys that could earn much higher incomes in other fields would leave the bankruptcy arena. Bankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously, would be driven elsewhere, and the bankruptcy field would be occupied by those who could not find other work and those who practice bankruptcy law only occasionally almost as a public service. Bankruptcy fees that are lower than fees in other areas of the legal profession may operate properly when the attorneys appearing in bankruptcy cases do so intermittently, because a low fee in a small segment of a practice can be absorbed by other work. Bankruptcy specialists, however, if required to accept fees in all of their cases that are consistently lower than fees they could receive elsewhere, will not remain in the bankruptcy field.

H.R. Rep. No. 595, 95th Cong., 1st Sess. § 330 (to accompany H.R. 8200, 95th Cong., 1st Sess. 1977)). The short lesson of § 330 and its legislative history is that bankruptcy lawyers should be compensated similarly to their counterparts who practice in other specialties.

With these principles as guidance, the court must analyze the specific objections of the Bankruptcy Administrator:

1. **The Reasonable Rate**

The Bankruptcy Administrator has objected to Mr. Badger's fee application compensating him at a rate of $225/hour. That rate exceeds the relevant market rate and must be rejected on that account. The appropriate reasonable rate for Mr. Badger's services is $175/hour in these Chapter 13 cases and $195/hour in these Chapter 11 cases. Both of the allowed rates are at the "top" of the relevant market which reflects the court's appreciation of Mr. Badger's skill, ability and experience.

The appropriate hourly rate used for a professional's services is determined largely by the relevant market. The court's role is to determine the relevant market, to determine the appropriate rates that exist in that market and then to compensate professionals -- generally attorneys -- on that basis, subject to adjustments according to the standards set out above. As such, the court should not "set" rates or fees in the way a regulatory commission does in a regulated industry. In these cases there are no significant adjusting factors, so the issue involves

simply the determination of the appropriate hourly rate in the relevant market.

The court finds the "relevant market" for bankruptcy cases in Charlotte consists of at least two sub-markets, which essentially are specialty areas among the debtors' lawyers.[2] Although these sub-markets are described generally as "Chapter 13 cases" and "Chapter 11 cases," they are better described as individual debtor reorganizations (generally Chapter 13 cases) and complex business reorganizations (generally Chapter 11 cases). The bankruptcy Bar breaks itself down into attorneys doing Chapter 13 and Chapter 11 work with relatively few crossovers. The hourly rate structure is likewise divided. The court finds that in Charlotte, the market rate for Chapter 13 cases is up to $175/hour; and that the rate for Chapter 11 cases is up to $210/hour, with the high-norm for uncomplicated debtor cases at $195/hour.

Mr. Badger sought a rate of $225/hour and sought to justify that on several grounds. First, he showed his own skill and ability, which are significant. Mr. Badger has been practicing bankruptcy law for over 15 years. He practices in all areas of bankruptcy law for both debtors and creditors (which is somewhat unusual); he is a North Carolina Board certified specialist in bankruptcy practice and is a member of the North Carolina Board

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[2] The court has, literally, daily observation of both the Bar and their hourly rates based upon regular practice at hearings and equally regular fee applications. These findings are based upon the court's own observation.

of specialization; he has the highest professional and honesty rating by the legal rating service of Martindale-Hubbell; and, he spends an extraordinary amount of time teaching and participating in continuing legal education. From all of that and this court's own observation, it is beyond doubt that Mr. Badger is among the best of the bankruptcy lawyers who practice before this court. But, the court is unable to find that he is so far superior to the rest of that group as to justify an hourly rate higher than that charged by the rest of the group of lawyers who also do an excellent job of representing their clients in this court.

Second, Mr. Badger showed how his office maximizes the efficiencies of specialization by delegating less complex tasks to lawyers in his office having less experience and correspondingly lower hourly rates. He also showed the efficiencies that his office has achieved by automation and by billing only client-active services. All of this, though impressive, is but what one would expect in a superior law office and is reflected in the hourly rate set by the local market. While impressive, none of the items mentioned -- from delegation to automation -- is foreign to any good law office, and all of these features are natural to the best law offices. Badger & Associates is in the latter category. But again, the court can find nothing to set it "ahead of the pack" of a number of superior law offices that regularly practice in this court.

Third, Mr. Badger showed that 60 percent of the Chapter 13 cases in this district are ultimately dismissed. To the extent

attorney's fees are in the Chapter 13 plan payment schedule, when the case is dismissed, they go uncollected. So, Chapter 13 attorneys face a real risk of non-payment in a significant number of their cases. But, that does not justify a higher than norm fee for two reasons. First, the risk of non-payment is borne by all debtors' lawyers and thus, is reflected in the "market rate" of those lawyers. Second, the Supreme Court has held that enhancement of a fee on account of risk of non-payment is reserved for exceptional cases only. Delaware Valley Citizens' Council, 483 U.S. 728.

Mr. Badger also showed a few billing abuses by other practitioners. The court recognizes that those exist and continue to occur from time to time, but they are the aberration rather than the norm. Mr. Badger's own billing practices are laudable, but they are more the standard practice than remarkable and do not justify a fee above the market hourly rate.

To repeat, Mr. Badger is among the best of the bankruptcy lawyers who appear before this court. For all of the reasons stated in the legislative history of § 330, he deserves to be compensated at the highest hourly rate in this relevant market. The court finds that rate is $175/hour for the Chapter 13 cases and $195/hour for these uncomplicated Chapter 11 cases.

The court notes that this Order determines the fees in the cases having pending applications only and does not presuppose to determine hourly rates for other lawyers or for Mr. Badger in other cases.

2. Billing Time

The Bankruptcy Administrator has objected to the practice of automatically billing an hour's time for preparation and submission of fee petitions. That practice is not justified and will not be compensated.

The Supreme Court has recognized that hours not reasonably expended should not be compensated. Hensley, 461 U.S. at 434. Quite logically, hours *not expended* should not be compensated. (That is naked logic).

The Fourth Circuit has held that time spent in fee litigation is compensable. Daly, 790 F.2d at 1080. It follows that time spent in fee preparation should be compensated. That is particularly justified on account of the detail and specificity required for attorney fee applications.

Considering both of these principles, the court can approve only attorney time *actually spent* in preparation and submission of the fee application. Consequently, the practice of assessing one hour for the preparation of each application cannot be approved.

But, billing-for-billing can become a circular procedure. It is not inappropriate for an attorney to adopt a convention of billing for the preparation of each fee application for a flat rate just to reduce the cost of billing. But, the court cannot approve a "convention" of billing more than one-tenth of an hour of attorney time for preparation of the fee application in cases such as these. Consequently, the court will award one-tenth of

an hour for the preparation of the fee applications in each of the above-captioned cases (without prejudice for the applicant to demonstrate that more time was expended and thus is compensable).

3. Other Observations

Attorney fee litigation is distasteful to all involved. It pits either lawyer against client or lawyer against lawyer on a level where the issues are personal -- such as skill, ability, reputation, competence -- instead of the substantive issues from which the lawyer should be detached. The Supreme Court has admonished that "a request for attorney's fees should not result in a second major litigation." Hensley, 464 U.S. at 437. Justice Brennan noted that attorney fee litigation "must be one of the least socially productive types of litigation imaginable." Hensley, 461 U.S. at 442 (Brennan, J., concurring in part and dissenting in part). Here, the Bankruptcy Administrator's objections were specific, well targeted, meritorious, and thus, have produced a "socially productive" result.

Attorney's fees in bankruptcy cases in general draw a lot of fire since, in these cases, someone (if not everyone) often fails to receive full payment on a debt. But, this court's experience has been that the bankruptcy Bar (including debtors' lawyers), far from the image of buzzards on a road-kill, is responsible for a great deal of debt being collected for creditors. Creditors of course want all of their debt collected. The reason for bankruptcy law is that that is often not possible for all of the creditors. It must be remembered that all Chapter 11, 12 and 13

debtors (with their lawyers' help) are trying to pay their creditors more than legally they would have to pay in Chapter 7 liquidation proceedings. The debtor's lawyer usually helps this process which ultimately results in a greater collection by creditors. Thus, lawyers -- and their compensation -- are part of the bankruptcy process that our Constitution and our Congress have mandated, and generally facilitate the debt collection process and enhance the dividend paid to creditors.

## CONCLUSION

The court finds nothing objectionable about the fee applications before it except the two items raised by the Bankruptcy Administrator. Consequently, the court will enter separate Orders in each of the above-captioned cases which are consistent with this Order (1) awarding Mr. Badger compensation at the rate of $175/hour in these Chapter 13 cases and $195/hour in these Chapter 11 cases; and (2) awarding one-tenth of an hour in each case for time spent on the preparation of the fee applications.

This the 20th day of June, 1991.

George R Hodges

George R. Hodges
United States Bankruptcy Judge